

Consolidated Delta Smelt Cases

On December 14, the court ordered that FWS's Biological Opinion and RPA for the delta smelt be remanded back to the Service. The parties were not able to negotiate a joint remedy. So On January 28, Plaintiffs filed a motion for injunctive relief.

1) Seek to enjoin operation of certain RPA components.

RPA components 1 & 2 during remand of the BiOp.

2) Asks the court to vacate reclamation's decision to adopt and implement the BiOp and RPA.

3) Asks the court to order federal defendants to reinitiate consultations to produce a new legally adequate BiOp for the delta smelt.

Asked for a new BiOp as opposed to updates or amendments to the previous BiOp.

Required by ESA when "new information reveals effects of the action that may affected listed species or critical habitat in a manner Not previously considered."

Court previously ruled that BiOp was based on flawed analytical methods.

Hearing scheduled for **February 25**

Consolidated Salmon Cases

A similar motion has been filed regarding the consolidated salmon cases but the proceedings are a little behind the smelt cases.

Plaintiffs filed a motion for a preliminary injunction on **February 3**

Seeking to enjoin the implementation of certain components of the National Marine Fisheries Service's (NMFS) RPA.

That hearing is scheduled for **March 8**.

Delta Smelt Commerce Clause issue is being appealed to the 9th circuit

Stewart & Jasper Orchards v. Salazar

The Pacific Legal Foundation is representing Stewart & Jasper orchards in the appeal.

Their argument is basically that:

Because the delta smelt is a purely intrastate species and because it has no commercial value the government has no power to regulate it under the Endangered Species Act.

Oral Argument began on **February 15**

Association of Irrigated Residents v. California Air Resources Board
(Tentative Decision) Released January 24th

Court holds that ARB failed to comply with CEQA in its adoption of the Scoping Plan for AB 32.

ARB violated CEQA in two ways:

(1) It failed to adequately analyze alternatives to the scoping plan in the environmental review documents;

ARB must provide the public with some indication based on factual analysis as to why it chose the scoping plan over alternatives. ARB's analysis provides no evidence to support its approach even though such data was available.

(2) It impermissibly approved and implemented the scoping plan prior to completion of environmental review.

ARB approved and began implementing the scoping plan prior to completing its obligation to review and respond to public comments. The court treated a resolution adopted at a hearing in Dec. 2008 as initiating the Board's approval of the Scoping Plan, many months before the finalization of its CEQA review.

The ruling proposes to set aside ARB's CEQA documentation and to enjoin "any implementation of the Scoping Plan" until ARB corrects the CEQA violation.

California Farm Bureau Federation v. State Water Resources Control Board
Issued January 31

California Supreme Court opinion that addresses the constitutionality of annual water right fee statutes. The statutes allow the state water board to impose fees on permit and license holders. Several groups challenged the fees alleging that the statutes and the state water board's implementing regulations are unconstitutional on their face and as applied.

1st argument was that the statutes are invalid because they passed through the legislature without the 2/3 majority required for new taxes.

The Court holds that the statute is valid on its face because it imposes a regulatory fee and not a tax.

It allows the State Water Board to impose fees "only for the costs of the functions or activities described [in Water Code section 1525(c)], and not for general revenue purposes."

The statute simply permits the recovery of costs the water board incurs in annual supervision of water usage and the processing of applications for new or modified rights.

However, the court also holds that the record is insufficient to determine whether the fees, as applied through the regulations, were reasonably proportional to the costs of the regulatory program.

This issue was remanded to the trial court to determine whether the associated costs of the regulatory activity were reasonably related to the fees assessed.

The 2nd argument was that the statutes violate the Supremacy Clause of the U.S. constitution because they impose a fee on water rights held by the United States

The court holds that the statute itself does not violate the supremacy clause because under the statute, the “fees” are not imposed on the United States, but are passed through to federal contractors.

So the statute is valid on its face.

However, the court notes that the fees imposed on federal contractors must be based on the contractor’s specific interest in the federal property.

Here, the water board assessed against the federal contractors, the amount of annual fees associated with *all* the Bureau of Reclamation’s permits and licenses even though the contractors have contractual rights for water delivery over only a small portion (5 %).

From the record, the court could not determine how much of the water in question could be allocated to the federal contractors’ beneficial interest.

This matter was remanded to the trial court to determine whether it was appropriate for the Water Board to pass through the entire fee to the federal contractors or whether only a portion of the fee is appropriate to pass through.

Basically the opinion upholds the water right fee statutes on their face, but remands issues concerning the application of the fee statute through the State Water Board's regulations back to the trial court for further fact-finding.

Several parties have requested additional hearings before case is remanded.